

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
July 12, 2016

In re B. S. POLLARD, Minor.

No. 331315
Wayne Circuit Court
Family Division
LC No. 15-520035-NA

Before: JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ.

PER CURIAM.

Respondent, father of the minor child at issue, BSP, appeals as of right the order terminating his parental rights to the child under MCL 712A.19b(3)(g) (failure to provide proper care or custody), (j) (reasonable likelihood that the child will be harmed if returned to the parent), and (k)(ii) (child or sibling had been abused by actual or attempted sexual penetration). We affirm.¹

This case arises from allegations that respondent sexually molested BSP's older half-sister, AT, while living with the mother of both girls. AT, then 13 years old, testified that respondent repeatedly touched her private area and put his mouth on her private area. She testified that the abuse occurred from the time that she was six or seven years old and continuing until she was 10 or 11 years old. She also testified that he penetrated her vagina with his penis. According to AT, she had long obeyed respondent's admonishment not to tell anyone about the incidents until she finally told her mother, who became angry and took AT to the hospital. The resulting medical examination, conducted when AT was 12 years old, indicated that AT's hymen was not intact and had "several discontinuities." Respondent was tried on three charges of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b), but was acquitted after the jury found him not guilty.

I. JURISDICTION

¹ This case left the child in the sole legal and physical custody of her mother, who was not a respondent in these proceedings.

Respondent first argues that he was denied due process and a fair trial because of improper assumption of jurisdiction, improper consideration of hearsay, and ineffective assistance of counsel. We disagree.

Respondent asserts that he was denied due process because AT's testimony did not comport with the not-guilty verdict resulting from his criminal trial, and respondent's conduct did not fall under the relevant jurisdictional statute. He further contends that the testimony of the Child Protective Services (CPS) investigator was hearsay and that his trial attorney was ineffective for failing to object to the hearsay statements. "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). Ordinarily, the issue whether a child protective proceeding complied with a parent's right to due process is reviewed de novo. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). However, respondent did not raise any due-process issues below, thus leaving his due-process objections unpreserved. See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Similarly, respondent did not object to any testimony as inadmissible hearsay, and this issue is also unpreserved. See *id.* Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Id.* at 8-9.

A parent's right to the care, custody, and control of his or her child is recognized as an important liberty interest protected by due process. See *Sanders*, 495 Mich at 409. However, this right is not absolute, "as the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor and in some circumstances neglectful parents may be separated from their children." *Id.* at 409-410 (citation and quotation marks omitted). Due process requires that a parent receive minimal procedural protections before the state interferes with the fundamental right to the care, custody, and control of the parent's child. *Id.* at 410. A parent must receive an adjudication hearing before the state may interfere with his parental rights. *Id.* at 415.

Respondent first argues that the trial court clearly erred in assuming jurisdiction of the child under MCL 712A.2(b)(1). "To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *BZ*, 264 Mich App at 295. The trial court must find by a preponderance of the evidence that one or more grounds for jurisdiction under MCL 712A.2(b) is established. See MCR 3.977(E)(2). The rules of evidence apply during the trial. *Sanders*, 495 Mich at 405; MCR 3.972(C). The reason for obtaining jurisdiction was the sexual abuse of BSP's sibling. The referee report and recommendation noted in its factual findings and conclusions of law that MCL 712A.2(b) provided the statutory basis for jurisdiction, specifically citing the language from MCL 712A.2(b)(1). MCL 712A.2(b)(1) provides, in relevant part:

Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

The court may also assume jurisdiction under MCL 712A.2(b)(2), which provides:

Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

* * *

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

We conclude that the trial court properly assumed jurisdiction over the child under MCL 712A.2(b). AT testified that respondent sexually abused her over several years in the family home where the child at issue also lived, and the sexual abuse included oral sex and vaginal penetration. This Court has held under the doctrine of anticipatory neglect that how the parent treats one child is probative of how the parent will treat other children. *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). AT's testimony indicates that BSP would be subject to a substantial risk of harm to her mental well-being if she remained in respondent's care because of the substantial risk of sexual abuse. Therefore, the trial court properly concluded that a preponderance of the evidence supported assumption of jurisdiction under MCL 712A.2(b)(1). We also note that jurisdiction would have been proper under MCL 712A.2(b)(2) because a preponderance of the evidence supported a conclusion that respondent's home, "by reason of neglect, cruelty, drunkenness, criminality, or depravity" was an unfit place for the child to live. Accordingly, the trial court did not err in assuming jurisdiction of the child under MCL 712A.2(b).

Respondent also raises several due-process arguments within his argument regarding jurisdiction over the child. Concerning respondent's acquittal of related criminal charges, respondent cites authority for the proposition that criminality itself does not necessarily support a finding of parental neglect, but none for the proposition that being found not guilty of certain crimes precludes a contrary finding in a civil proceeding. In fact, as this Court recently stated, "a parent need not be criminally charged with or convicted of CSC for MCL 712A.19b(3)(k)(ii) to apply. Indeed, it is MCL 712A.19b(3)(n)(i) that addresses the situation where a parent has actually been convicted of a CSC offense" *In re Schadler Minors*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 327977); slip op p 2. Inconsistencies of this sort are readily explained by the differing evidentiary standards. A criminal conviction requires proof of every element of the crime beyond a reasonable doubt. *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). In contrast, a court assumes jurisdiction over a child in a child-protective proceeding on a mere preponderance of the evidence. MCR 3.972(C)(1); *Sanders*, 495 Mich at 405. It also determines the statutory grounds for termination based on clear and convincing evidence. MCR 3.977(E)(3). Because a court assumes jurisdiction over a child under a far less stringent evidentiary standard than that required for a criminal conviction, and because the court need only determine the statutory grounds for termination by clear and convincing evidence, the fact that respondent was found not guilty of CSC-I did not undermine the decision of the court in this case to assume jurisdiction over the child and terminate respondent's parental rights on the basis of the same allegations.

Concerning hearsay, respondent complains generally that the testimony of the CPS investigator “was mostly hearsay” regarding “things she was ‘informed of’ or ‘notified of.’” When termination occurs at the initial disposition, the trial court must find based on legally admissible clear and convincing evidence introduced at the trial or plea proceedings, or at the dispositional hearing, that one or more facts alleged in the petition are true and establish grounds for termination “under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n)[.]” MCR 3.977(E)(3). Respondent therefore contends that the court should not have considered hearsay, which is not legally admissible evidence, in determining jurisdiction or the statutory grounds for termination. See *id.*

The only specific assertion respondent contends constituted hearsay was the CPS investigator’s statement that she was informed on the day of the bench trial that there was a bench warrant out for respondent’s arrest for failure to pay child support with regard to BSP. Assuming that the CPS investigator’s statement constituted inadmissible hearsay, the error does not warrant reversal.

The referee report and recommendation, which was approved by the trial court, notes that respondent “has an outstanding bench warrant for non payment of child support.” However, the referee did not discuss the outstanding bench warrant for nonpayment of child support as evidence to support the assumption of jurisdiction or the statutory grounds for termination during the bench trial. Instead, the focus of the referee’s findings was AT’s testimony regarding the sexual abuse. In addition, although the bench warrant was mentioned briefly during the referee’s findings of fact in the referee’s report and recommendation, it was not discussed as a reason for the assumption of jurisdiction or termination of respondent’s parental rights in the referee’s discussion of her conclusions of law. Furthermore, the trial court did not mention the bench warrant during its review of the referee’s decision. Therefore, even assuming that the CPS investigator’s statements constituted inadmissible hearsay, the court’s decision was not inconsistent with substantial justice because the referee’s decisions regarding jurisdiction and termination were not based on the inadmissible evidence. See *Utrera*, 281 Mich App at 21-22 (concluding that although the trial court admitted extensive hearsay statements to establish the statutory grounds for termination, reversal was not required if substantial justice did not require reversal, and substantial justice did not require reversal if the petitioner provided clear and convincing legally admissible evidence of the statutory grounds).

Respondent does not discuss any other specific testimony that he contends constituted hearsay. “A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim.” *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Accordingly, respondent’s argument that the admission of hearsay evidence violated his right to due process fails.

Respondent also fails to establish ineffective assistance of counsel. “[A]lthough child protective proceedings are not criminal in nature, where the right to effective counsel arises from the Sixth Amendment, the Due Process Clause indirectly guarantees effective assistance of counsel in the context of child protective proceedings.” *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). A respondent preserves his claim of ineffective assistance of counsel by moving for a new trial or an evidentiary hearing. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Respondent did not move for a new trial or evidentiary hearing below,

and our review is therefore limited to mistakes apparent on the record. See *id.* “ ‘Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.’ ” *People v Stokes*, 312 Mich App 181, 189; 877 NW2d 752 (2015) (citation omitted), lv held in abeyance 878 NW2d 886 (2016). We review the trial court’s factual findings for clear error and the constitutional issue whether counsel was ineffective de novo. *Id.* With regard to a claim of ineffective assistance of counsel, “a [respondent] must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

Respondent contends that his counsel rendered ineffective assistance if this Court concludes that respondent’s attorney waived the issue of hearsay. Respondent fails to show a reasonable probability that, but for his counsel’s conduct, the result of the proceeding would have been different considering that the CPS investigator’s testimony regarding the bench warrant was not discussed as a basis for jurisdiction or termination, as discussed above, and respondent fails to describe any additional hearsay testimony. See *Trakhtenberg*, 493 Mich at 51. For these reasons, we reject respondent’s argument that he suffered a denial of due process in the proceedings below.

II. STATUTORY GROUNDS

Respondent also argues that the trial court erred in concluding that termination of his parental rights was warranted under MCL 712A.19b(3). We disagree.

We review for clear error a trial court’s factual findings and determinations regarding the statutory grounds for termination. *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). “Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake.” *In re Dearmon*, 303 Mich App 684, 700; 847 NW2d 514 (2014).

Petitioner sought termination at the initial disposition. With regard to termination of parental rights at the initial disposition, the court must find on the basis of clear and convincing, legally admissible evidence introduced during the trial or plea proceedings, or introduced at the dispositional hearing, that one or more facts alleged in the petition (1) are true, and (2) “establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n)[.]” MCR 3.977(E)(3). The court must also determine that termination is in the child’s best interests. MCR 3.977(E)(4). Again, the trial court terminated respondent’s parental rights under MCL 712A.19b(3)(g), (j), and (k)(ii), which provide as follows:

(3) The court may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be

able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

* * *

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

Because termination was decided at the initial disposition, the rules of evidence applied to the determination whether the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(E)(3). However, the rules of evidence do not apply to the determination of the child's best interests. MCR 3.977(E)(3) and (4). Further, although termination of parental rights requires proof of at least one of the statutory grounds on clear and convincing evidence, "the preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

AT's testimony provided a sound basis for the trial court's conclusion that respondent had sexually abused her for purposes of concluding that termination was warranted under MCL 712A.19b(3)(k)(ii). Respondent argues at length that AT was not a credible witness because she had a motive to lie about respondent in order to get out of trouble and because AT did not like respondent in general, but we defer to the trial court's special opportunity to observe witnesses and weigh credibility. *Dearmon*, 303 Mich App at 700. AT was a sibling of the subject child. See *Schadler*, ___ Mich App at ___; slip op at 2 (noting that a sibling is someone who has one or both parents in common with the subject child). AT testified that respondent put his penis in her vagina. She testified that the last time respondent inappropriately touched her was when she was 10 or 11 years old. Therefore, the court did not err in finding clear and convincing evidence that respondent engaged in abuse constituting criminal sexual conduct involving penetration. See MCL 750.520b(1). Accordingly, the trial court properly concluded that termination was proper under MCL 712A.19b(3)(k)(ii).

Respondent asserts that too much significance was attached to the evidence that AT's hymen was not intact, on the ground that "the medical records admitted indicated that this was not evidence of sexual abuse." Although there may be another reason why AT's hymen was not intact, a damaged hymen certainly comports with AT's testimony regarding the sexual penetration. Further, the records offered no other explanation for the condition. Accordingly, the trial court did not clearly err in considering this evidence when rendering its decision.

Concerning the risk of harm to the child if returned to respondent's custody as articulated in MCL 712A.19b(3)(j), respondent acknowledges that the caselaw recognizes that how a parent treats one child is indicative of how that parent will treat another. This principle is often described as "anticipatory neglect." See *In re LaFrance*, 306 Mich App 713, 730; 858 NW2d 143 (2014). Respondent argues that the principle does not apply in this case because BSP is his daughter and the child he allegedly abused was not. However, respondent does not provide legal authority establishing that the principle only applies to children related to the respondent. Although some sexual aggressors likely would indeed spare their own offspring while making victims of nonrelatives, respondent lived with the abused child and acted as a person *in loco parentis*. And the hazard presented certainly constituted a reasonable likelihood based on the conduct of respondent that BSP would be harmed if returned to respondent's custody for purposes of MCL 712A.19b(3)(j). See *In re Jenks*, 281 Mich App 514, 517-518; 760 NW2d 297 (2008) (affirming the termination of the respondent's parental rights under MCL 712A.19b(3)(b)(i) and (k)(ii) on the basis of the respondent's sexual abuse of his stepdaughter and concluding that the trial court did not err in finding that there was a reasonable likelihood that the minor children would suffer injury or abuse in the future if placed with the respondent). Therefore, the court did not err in terminating respondent's parental rights under this statutory ground. Because "[o]nly one statutory ground for termination need be established," *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012), and because MCL 712A.19b(3)(k)(ii) and (j) were established by clear and convincing evidence with regard to the misconduct mainly at issue in this case, we decline to consider whether proof of sexual abuse of a sibling also proves a failure to provide proper care and custody for purposes of MCL 712A.19b(3)(g).

III. BEST INTERESTS

Respondent argues that the trial court erred in concluding that termination of his parental rights was in the minor child's best interests. We disagree.

We review for clear error the trial court's best-interest determination. *White*, 303 Mich App at 713. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The focus of the best-interest determination is on the child, rather than the parent. *Schadler*, ___ Mich App ___; slip op at 2. The trial court must weigh all available evidence in determining the child's best interests. *White*, 303 Mich App at 713. In making this determination, "the court should consider a wide variety of factors that may include 'the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home.'" *Id.* (citation omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *Id.* at 714.

Respondent correctly points out that there was a lack of evidence concerning his relationship with BSP other than AT's testimony that the child returned from visits with respondent speaking of him enthusiastically, and there was no inquiry into respondent's parenting abilities. However, the trial court had little need to consider the more conventional

best-interest factors before concluding, by a preponderance of the evidence, that it was in the child's best interests not to reside with a man who had for years sexually molested that child's sister. To the extent that respondent contends that the trial court did not consider his bond with the child or any other factors, respondent did not present evidence on the issue during the trial. Furthermore, even assuming that the child had a bond with respondent, that bond does not outweigh the child's need for safety. Accordingly, the trial court did not err in concluding that termination was in the best interests of the child.

Respondent also contends that the trial court failed to consider the fact that the child was placed with relatives. Under MCL 712A.19a(6)(a), a child's placement with relatives weighs against termination. *Olive/Metts*, 297 Mich App at 43. Accordingly, "the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests." *Id.* The court may terminate parental rights even if the child is placed with relatives if the court finds that termination is nevertheless in the child's best interests. *Id.* However, the court must explicitly consider the fact that the child is placed with a relative at the time of the termination hearing in rendering its decision on best interests. *Id.* "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Id.* However, a child's biological mother is not included in the relevant definition of "relative." MCL 712A.13a(1)(j). See also *Schadler*, ___ Mich App ___; slip op at 3. Therefore, the trial court did not need to consider the child's placement with her mother. See *Olive/Metts*, 297 Mich App at 43.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Mark T. Boonstra